92-403

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TEAMSTERS LOCAL UNION No. 688, affiliated with the, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC.,

Respondent.

Appeal to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the U.S. District Court for the Eastern District of Missouri and the U. S. Court of Appeals for the Eighth Circuit appropriately and correctly exercised their authority when they vacated an arbitration award that did not draw its essence from a negotiated last chance agreement?

2. Whether the routine judicial review of an arbitration decision at a time when the federal court system is already heavily overloaded raises "special or important reasons," for the granting of a Petition for Writ of Certiorari by this Honorable Court?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case in this Honorable Court. A list of all parent and subsidiary companies of the Respondent was provided pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States in Respondent's Request for an Extension of Time in which to respond to Petitioner's Petition for Writ of Certiorari, filed earlier in this case.

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* On page iv of the Petition, the Petitioner incorrectly identifies Appendix H as Plaintiff's Motion for Summary Judgment in the U.S. District Court for the Eastern District of Missouri. In actuality, Petitioner's Appendix H is Defendant's Motion for Summary Judgment on Counterclaim in the U.S. District Court for the Eastern District of Missouri.

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TEAMSTERS LOCAL UNION NO. 688, affiliated with the, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the Eastern District of Missouri is reported at 959 F.2d 1438, No. 91-2876 (8th Cir., March 26, 1992), and is reproduced at Petitioner's Appendix C.

The unreported opinion of the United States District Court for the Eastern District of Missouri vacating the arbitration award is

reproduced at Petitioner's Appendix F (incorrectly cited as Appendix E in Petition for Writ of Certiorari, p.2).

The arbitration award granting reinstatement to the grievant is reproduced at Petitioner's Appendix I (incorrectly cited as Appendix H in Petition for Writ of Certiorari, p.2).

STATUTORY PROVISIONS INVOLVED

Arbitration Act, 9 U.S.C. §10(a):

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) When an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Labor Management Relations Act, 29 U.S.C. §185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. . . .

STATEMENT OF CASE

Coca-Cola Bottling Company of St. Louis, Inc. ("Respondent") is engaged in the production and sale of Coca-Cola and other soft drink products. The Respondent has collective bargaining relationships with four (4) labor organizations, including Teamsters Local Union No. 688 ("Petitioner").

As pointed out by the Petitioner, this proceeding is the result of a series of grievances filed by Kenneth Youngermann, a former employee of the Respondent. Mr. Youngermann was employed as a driver and was subject to the collective bargaining agreement entered into between the Respondent and the Petitioner. Pursuant to this collective bargaining agreement, Mr. Youngermann's grievances were submitted to an impartial arbitrator, and ten (10) discrete arbitrations were heard on October 4-6, 1989 and January 30-February 2, 1990. The Arbitrator issued his Opinion and Award on September 17, 1990, which ordered the reinstatement of Mr. Youngermann. (Petitioner's APP. I-1; I-76). This conclusion precipitated the filing by the Respondent of this case now on appeal.

Effective January 18, 1988, the Respondent implemented its Rules and Regulations and attendant disciplinary procedures, which called for a progressive disciplinary system. These Rules and Regulations establish three (3) categories of violations, each requiring different numbers of violations before termination is

warranted. (Petitioner's APP. I-11 to I-13). Under the Rules, the discipline for Category A violations ranged from counseling sessions and warnings to "[i]mmediate suspension without compensation, pending investigation for termination." (Petitioner's APP. C-3; Petitioner's APP. I-11 to I-13).

Prior to August 16, 1988, Mr. Youngermann had already received the first four steps of discipline under the five-step procedure for Category A violations. (Petitioner's APP. I-29 to I-31). Mr. Youngermann's fifth and dischargeable step was comprised of three separate incidents, including two instances involving customer complaints about Mr. Youngermann's unacceptable performance and behavior while servicing their accounts. *Id.*

As a result of the above, a meeting was held on September 6, 1988, between Mr. Youngermann, two union stewards, and three representatives of the Respondent to discuss Mr. Youngermann's impending discipline. During this meeting, there was a full and complete discussion of the reasons for Mr. Youngermann's impending termination. At the Petitioner's urging, however, the Respondent agreed not to terminate Mr. Youngermann but to give him one last chance to reform. Therefore, pursuant to the Union's urging, the Company drafted a disciplinary action notice, which was characterized as a "Last Chance Agreement". (Petitioner's APP. I-15 to I-16). This Last Chance Agreement provides as follows:

> *Pursuant to the Union's recommendation* on a one time non-precedent setting basis the Company will agree to the following in this situation only: A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that

the employee does not have the skill and ability to perform satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section 1 of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.

Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of next occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its rights in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that a fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis. (Emphasis added).

(Petitioner's APP. J).

This Last Chance Agreement, among other things, gave the Respondent the explicit right to immediately terminate Mr.

Youngermann on the happening of any "such offense of a similar and/or like nature" in violation of a Category A Rule or Regulation. It also spelled out other misconduct which would be prohibited, such as "continuation of poor work performance, including carelessness, inefficiency, and inattention to duties." (Petitioner's APP. J). The document was read and signed by the Respondent's representatives and the union stewards. Even though Mr. Youngermann did not sign the agreement, the Arbitrator found that the union stewards signed as his collective bargaining representatives, thereby binding Mr. Youngermann to the terms of the Last Chance Agreement. (Petitioner's APP. I-63)

Following the execution of the Last Chance Agreement, the Respondent continued to have problems with Mr. Youngermann's work performance. These problems resulted in a 40-day suspension without compensation in December, 1988, which, although grieved and arbitrated as one of the ten discrete arbitrations, was upheld by the Arbitrator as justified. (Petitioner's APP. I-66).

Additional problems following the December 40-day suspension ultimately led to Mr. Youngermann's termination on May 1, 1989. (Petitioner's APP. I-35 to I-40) The events which led to Mr. Youngermann's termination on May 1, 1989, again reflect his inability or unwillingness to comply with job requirements which even the newest employee would find readily achievable.

The first incident occurred on April 6, 1989, when Distribution Supervisor Steve Juenger accompanied Mr. Youngermann on his route, after being advised by Mr. Youngermann that he did not feel "qualified" to run his route despite years of experience as a delivery driver. On elementary job duties Mr. Youngermann required the direction from Mr. Juenger one would expect of a new hire, and when requested by Mr. Juenger to perform certain tasks Mr. Youngermann simply responded that he was not qualified to run the route. On several occasions, Mr. Juenger had

to give Mr. Youngermann direct orders to perform his job duties, including a direct order to get out of the delivery truck and to commence work. (Petitioner's APP. I-35 to I-38)

A second incident occurred on March 28, 1989, when a Wal-Mart store manager experienced a problem with Mr. Youngermann.[1] The store manager testified that Mr. Youngermann made a Coca-Cola delivery to the store in which he managed on March 28th and refused to take the order into the warehouse as required. Instead, Mr. Youngermann left the product at the door, and, worse yet, left it in a position that interfered with the Wal-Mart operation. (Petitioner's APP. I-40 to I-42)

A third situation arose on April 19, 1989, when Mr. Youngermann, his immediate supervisor, and a union steward were called to a meeting by Distribution Superintendent Roustio. The evidence is unchallenged, even by the Union, that the purpose of the meeting was remedial, not disciplinary. Mr. Youngermann was handed three (3) memos for instructional purposes which addressed the following issues: the Wal-Mart store incident referenced immediately above; an incident involving Mr. Youngermann spending in excess of one (1) hour and thirty-eight (38) minutes to verify a $2.00 or $3.00 shortage; and his failure to follow two direct orders from Distribution Supervisor Steve Juenger on April 6, 1989, referenced hereinbefore. (Petitioner's APP. I-42 to I-49). During the meeting Mr. Roustio said Mr. Youngermann became defensive after having had the three (3) instructional memos read to him. He resisted efforts to use the meeting and memos as positive instructions and opportunities intended to correct his behavior. After Mr. Youngermann characterized the Respondent and Mr. Roustio as being ignorant, stupid, and ridiculous, Mr. Roustio, quite candidly testified that

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[1] This was documented by a memo from the store manager dated April 11, 1989.

he lost his temper and advised Mr. Youngermann he was suspended for "insubordination". (Petitioner's APP. I-43 to I-45). Subsequently, Mr. Roustio learned of the following misconduct by Mr. Youngermann.

On April 19th Distribution Supervisor Ryan happened to examine the interior of Mr. Youngermann's vehicle. He found it in total disarray and in violation of a Category A rule. Mr. Ryan called two union stewards over to examine the truck. They expressed their amazement by one or both inquiring, "Whose truck is this?" (Petitioner's APP. I-43).

Subsequently, Mr. Roustio learned of two other Category A rule violations which had been committed by Mr. Youngermann. He was advised that on April 18, 1989, Mr. Youngermann had failed to clock out at the end of his workday, for which he had been previously warned, and that he had failed to properly fill out a Department of Transportation record.

Mr. Youngermann was suspended on April 19, 1989. On April 26, 1989, a Disciplinary Action Notice was filled out, outlining the above violations, and a discharge letter was issued on May 1, 1989. (Petitioner's APP. I-49 to I-50). The Respondent terminated Mr. Youngermann for being in violation of the Last Chance Agreement.

Being well aware of the fact that the Last Chance Agreement existed and was binding on Mr. Youngermann, the Arbitrator chose to ignore its existence and decide the grievances in relation to the just cause standards enunciated in the main collective bargaining agreement. (Petitioner's APP. I-56 to I-60). In so doing, the Arbitrator formulated the issue as follows: "was the grievant discharged for cause, and if not, what is the proper remedy under the [Collective Bargaining] Agreement." (Petitioner's APP. I-59). Under this standard, the Arbitrator found that the Respondent did not have just cause to terminate Mr. Youngermann and that no violation of the Last Chance

Agreement had taken place. With respect to the condition of Mr. Youngermann's truck, the Arbitrator found that others had similarly left their vehicles in disarray. With regard to the transposition of numbers on the DOT form, he found the erroneous entry to have been an "inadvertent transposition." (Petitioner's APP. I-72 to I-74). A violation was found, however, with respect to Mr. Youngermann's failure to clock out at the end of his shift. While the Arbitrator ruled that this violation was *de minimis* and did not warrant discharge, (*Id.*), the District Court and the Court of Appeals, on a proper review of the Arbitrator's award, correctly found that the violation, *de minimus* or not, was adequate basis for discharge under the terms of the Last Chance Agreement, which superseded the collective bargaining agreement, including the just cause provisions contained therein.

SUMMARY OF ARGUMENT

This case involves the routine review of an arbitrator's decision. No special or important legal issues are presented herein which require judicial review by this Honorable Court. Neither the U.S. Court of Appeals nor the U. S. District Court issued a decision in contravention of established precedent rendered by this Court or by any other court. Furthermore, the decision below is not "so far departed from the accepted and usual course of judicial proceedings," and does not "sanction such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10(a) of Rules of the Supreme Court of the United States. While unable to address the merits of a dispute, it is clearly established that courts are free to set aside an arbitration award that does not "draw its essence" from the collective bargaining agreement. Such is the case at hand. Finding that the Arbitrator's decision ignored the plain and unambiguous terms of the Last Chance Agreement, the District Court correctly found, and the Court of Appeals properly affirmed, that it did not draw its essence from the Last Chance Agreement.

ARGUMENT

A. The Lower Federal Court Decisions Do Not Contradict Or Undermine The Well-Established Principles Established By This Court

The Petitioner is correct in its assertion that the judicial review of arbitration awards is very limited. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 264, 98 L.Ed.2d 286 (1987), *Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Union Workers*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300, *reh'g denied*, 430 U.S. 988, 97 S.Ct. 1689, 52 L.Ed.2d 384 (1977); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Any "judicial non-interventionist" policy adopted by this Court in the *Steelworkers Trilogy* cited by the Petitioner,[2] however, does not, and has not, completely foreclosed the review of arbitration decisions by federal courts.

To the contrary, this Court has made it very clear that judicial review, while limited, is still proper when the arbitration award fails to draw its essence from the collective bargaining agreement. *Misco, Inc.*, 484 U.S. at 36; *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. While it is generally recognized that courts may not "reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract," *Misco, Inc.*, 484 U.S. at 36, and that courts must generally give deference to an arbitrator's decision even if the court would have decided the case differently had it considered the matter in the first instance, *Nolde Bros. Inc.*, 430 U.S. at 253-54, courts may review and overturn

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[2] The *Steelworkers Trilogy* consists of: *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra.*

a decision that has no rational basis rooted in the collective bargaining agreement, *Id.* No such rational basis exists where the arbitrator has acted in excess of the authority granted to him by the collective bargaining agreement, *Bakers Union Factory, #326 v. ITT Continental Baking Co.*, 749 F.2d 350, 353 (6th Cir. 1984), or where the award is merely the arbitrator's "own brand of industrial justice," *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. In such situations, the award does not draw its essence from the collective bargaining agreement, and the court is free to review and overturn the award without conflicting with, disregarding, or undermining the principles set forth in the *Steelworkers Trilogy*.

The Court of Appeals and the District Court in the case at hand did not contravene established precedent of this Court or any other court by reviewing and ultimately vacating the arbitrator's award. In fact, both courts specifically recognized the above-mentioned principles, (Petitioner's APP. C-7 to C-8; Petitioner's APP. F-4 to F-6), and, without reviewing the merits of the case, correctly found that the arbitrator's decision failed to draw its essence from the Last Chance Agreement involved herein.

Federal policy strongly favors the private settlement of labor disputes. *Misco, Inc.*, 484 U.S. at 37. This policy, however, encompasses more than just the finality of arbitration awards; it also encourages the use of other means of settlement, such as last chance agreements.

> It is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, federal labor policy encourages that procedure no less than arbitration.

Bakers Union Factory, #326, 749 F.2d at 353 (quoting *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3d

Cir. 1977)). Thus, while parties who have bargained for an arbitrator's interpretation of a contract should generally not be deprived of such interpretation, "[p]arties who reach a settlement pursuant to a formal grievance procedure have not bargained for an arbitrator's construction of the collective bargaining agreement: they have bargained for their own construction." *Bakers Union Factory, #326*, 749 F.2d at 354. The parties in the case at hand reached such an agreement, i.e., the Last Chance Agreement which was clearly meant to override the terms of the collective bargaining agreement with respect to any further rule violations by Mr. Youngermann. It only follows, then, that the obligations of the parties are controlled by such agreement. *Bakers Union Factory, #326*, 749 F.2d at 354 ("the policy in favor of the finality of arbitration must yield to the broader policy in favor of the parties' chosen method of non-judicial dispute resolution."). Thus, the issue before the lower courts was whether the Arbitrator's decision drew its essence from the Last Chance Agreement.

That the Arbitrator's decision in the case at hand did not draw its essence from the Last Chance Agreement can be seen from the fact that the Arbitrator ignored the plain, unambiguous language contained therein. Nowhere in the Last Chance Agreement is there a requirement that just cause exist or that a violation be more than *de minimis*. While these may have been requirements under the collective bargaining agreement, they certainly were not requirements under the Last Chance Agreement. It is ludicrous to argue that the Last Chance Agreement did nothing more than set forth the Respondent's rights under the collective bargaining agreement. If such contention were true, what, then, would be the purpose of executing such an agreement.

Several courts have recognized that last chance agreements supersede the provisions of a collective bargaining agreement, including any just cause provisions contained therein. *Ohio Edison Co. v. Ohio Edison Joint Council*, 947 F.2d 786, 787 (6th

Cir. 1991) (last chance agreements are normally binding in arbitration); *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aero Space Workers, Air Transport Dist. Local #143*, 894 F.2d 998, 1000 (8th Cir. 1990) (because arbitration board disregarded plain language of settlement agreement, it acted without authority and its award must be vacated); *Tootsie Roll Indus., Inc. v. Local Union No. 1 Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987) (enforcement of an arbitration award based on a policy outside a last chance agreement properly denied); *Bakers Union Factory, #326*, 749 F.2d 354 (no reason to defer to arbitrator's decision when "a party claims that the chosen means of dispute resolution is private settlement."). Thus, when an arbitrator is called upon to apply a last chance agreement to a dispute, he or she is not free to ignore the plain, unambiguous language of its provisions. *Misco*, 484 U.S. at 38; *Northwest Airlines, Inc.*, 894 F.2d at 1000. Likewise, while it is within the arbitrator's power to determine whether the terms of a last chance agreement have been breached, *Bakers Union Factory, #326*, 749 F.2d at 356, it is *not* within the arbitrator's authority to amend or alter the agreement, *Northwest Airlines, Inc.*, 894 F.2d at 1000. More specifically, an arbitrator may not ignore a penalty that is plainly and unambiguously set forth for a particular misconduct and fashion his own remedy, even if it is felt that the penalty provided is inequitable or unduly harsh. *Northwest Airlines, Inc.*, 894 F.2d at 1000; *Contico Int'l, Inc. v. Local 160, AFL-CIO*, 738 F. Supp. 1262 (E.D. Mo. 1990); *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood, Local 6 of Int'l Alliance of Theatrical Stage Employees & Moving Picture Operators of U.S. and Canada*, 543 F.Supp. 1 (E.D. Mo. 1981), *aff'd*, 715 F.2d 405 (8th Cir. 1983).

The U. S. Court of Appeals for the Seventh Circuit has applied this rationale and declined to give deference to an arbitrator's decision awarding reinstatement of an employee terminated pursuant to a last chance agreement entered into because of the

employee's excessive absenteeism. *Tootsie Roll Indus., Inc.*, 832 F.2d 81. There, the employee was to maintain an acceptable attendance level in accordance with the standards specifically set forth in the last chance agreement, but he failed to do so. The arbitrator, however, refused to apply the attendance standards in the agreement, opting instead to reference the more lenient standards set forth in the collective bargaining agreement. Upon review, the court refused to enforce the arbitrator's decision, holding that:

> We agree with the district court's finding that the arbitrator's conclusion that all aspects of Tootsie Roll's regular attendance policy must apply to the Last Chance Agreement does not draw its essence from the agreement. We are convinced that in using the general attendance policy to find [the employee's] absences excusable, the arbitrator based his award on a policy outside the letter agreement. *In fact, if the parties had intended the regular policy to apply, there would have been no reason for spelling out the very specific attendance requirement contained in the letter agreement* and they would have written such language into the contract with specificity had they so intended. The effect of the arbitrator's conclusion was to eliminate the agreement's provision that [the employee] would be terminated if she was absent "for any reason whatsoever." Thus, the district court properly refused to enforce the arbitrator's award because he failed to follow the clear requirements of the agreement.

Id. at 83-84 (emphasis added).

The Eighth Circuit has also vacated arbitration awards in situations where the arbitrator failed to consider pertinent language in a superseding settlement agreement. *See Northwest Airlines, Inc.*, 894 F.2d 998; *see also George A. Hormel & Co. v. United Food & Commercial Workers, Local 9, AFL-CIO*, 879

F.2d 347 (8th Cir. 1989) (dealing with language in a collective bargaining agreement); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988) (finding that arbitrator disregarded plain, unambiguous language in collective bargaining agreement).

In *Northwest Airlines, Inc.*, a discharged employee was ordered to be reinstated as an equipment service operator by an arbitrator in an unrelated dispute. 894 F.2d 998. The employer, however, refused to do so because the employee did not have a valid driver's license. A settlement agreement was, therefore, entered into providing reinstatement upon the employee's attainment of a license, with the failure to do so to be treated as a voluntary resignation. The employee subsequently failed to obtain a valid driver's license, and, in accordance with the settlement agreement, the employer treated such failure as a voluntary resignation. The arbitration board to which the dispute was submitted, however, found that "the settlement agreement arose out of an arbitration award reinstating [the employee] and that the award dealt with discharge under the `just cause' provision of the collective bargaining agreement." *Id.* at 999. The arbitration board, finding that the employee had not violated the intent and purpose of the settlement agreement, ordered reinstatement. The Court of Appeals, however, after recognizing the general principles previously highlighted, pointed out that the terms of the settlement agreement were plain and unambiguous and, that by disregarding those terms, the arbitration board acted without authority. The court vacated the award. *Id.* at 1000.

Also, in *Sears, Roebuck & Co. v. Automotive Petroleum and Allied Indus. Union, Local 618*, 570 F.Supp. 650 (E.D. Mo. 1983), an arbitrator's decision reducing an employee's discipline from discharge to suspension was vacated because it failed to draw its essence from a last chance agreement. The employee, who was discharged for being rude and discourteous to a cus-

tomer, grieved his discharge and was reinstated under the terms of a last chance agreement providing for immediate termination upon "any reoccurrence of discourteous and rude treatment of customers or obscene and disrespective or subordinate actions with management." *Id.* at 652. The employee was thereafter terminated pursuant to the agreement. The arbitrator found that the employee had in fact violated the last chance agreement by engaging in the prohibited conduct outlined therein. Even so, the arbitrator held that the employer was not justified in terminating him. After finding review of the award to be appropriate under governing federal law, the court stated that, *once the arbitrator determined that the last chance agreement had in fact been violated, he "was without authority to determine the appropriate punishment."* *Id.* at 653 (emphasis added). The Court went on to hold that:

> The penalty by agreement of the parties, is discharge. The number of credible complaints, which the board here found to be a mitigating circumstance, is irrelevant because the letter provides that "[a]ny reoccurrence . . . will result in" discharge . . . In ruling that discharge was an inappropriate punishment, the board exceeded its authority and "dispense[d its] own brand of industrial justice."

Id. at 653-654 (quoting *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597). The Court also rejected the notion that "proper cause" was needed under the last chance agreement in order to justify termination, since the agreement clearly specified the conduct giving rise to discharge.

Under the above-cited precedent, it is clear that once the Arbitrator found that Mr. Youngermann had in fact violated the Last Chance Agreement, the Arbitrator's inquiry should have ceased. According to the Last Chance Agreement, an "offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations," constituted, in the words of the Arbitra-

tor, a "triggering event" warranting immediate termination. (Petitioner's APP. I-57; Petitioner's APP. J). The Arbitrator concluded that two of the incidents cited by the Respondent as "triggering events" under the Last Chance Agreement, the DOT violation and the condition of Mr. Youngermann's truck, did not constitute infractions of Category A Rules or Regulations (Petitioner's APP. I-74). It is generally recognized that an arbitrator's "determinations [on these issues] retain the benefit of a deferential standard of review." *Bakers Union Factory, #326*, 749 F.2d at 356. Contrary to the Petitioner's assertions, the Court of Appeals in the case at hand recognized this principle and did not improperly review the merits of the Arbitrator's decision, stating that:

> While we may not agree with the arbitrator's findings on these issues, we "may not reject those findings simply because [we] disagree[ ] with them." *Misco*, 484 U.S. at 38, 108 S.Ct. at 371.

(Petitioner's APP. C-12 and C-14).

Not only did the Court of Appeals give deference to the Arbitrator's determinations as to the occurrence of a triggering event, but it also gave deference to the arbitrator's own determination that he "had [the] authority, upon finding a rules violation had occurred, to determine 'proportionality of discharge *unless the contract mandates an exclusive remedy.*'" (Petitioner's APP. C-12 to C-13; Petitioner's APP. I-57 to I-58). The Last Chance Agreement at issue herein, however, provided for an exclusive remedy, and the Arbitrator improperly applied his own brand of industrial justice by refusing to apply it.

The Arbitrator did, however, find that the failure to clock out was a violation of Company Rule A-10 and that Mr. Youngermann had, indeed, failed to clock out. (Petitioner's APP I-74). At this point, the Arbitrator's authority ended, and so should have his inquiry. The exclusive, bargained for remedy clearly provided

for in the Last Chance Agreement should have been applied. In short, the Arbitrator, after finding a Category A violation, exceeded his authority by altering the clear and unambiguous terms of the Agreement. *See Northwest Airlines, Inc.*, 894 F.2d at 1000. The lower courts did not exceed their authority or contradict established precedent by finding that the decision rendered, therefore, did not draw its essence from the agreement. The Court of Appeals and the District Court did not substitute their own interpretation of the Last Chance Agreement for that of the Arbitrator. Rather, the courts found, in accordance with established precedent, that the Last Chance Agreement superseded the just cause provisions of the collective bargaining agreement and that the Arbitrator's attempt to apply these superseded provisions contravened the plain language of the Last Chance Agreement. Therefore, the Arbitrator's decision was clearly based on matters outside the contract he was asked to interpret.

B. The Routine Judicial Review Of An Arbitration Decision Does Not Raise Special or Important Issues And Does Not Threaten To "Open The Floodgates" Of Litigation

The principle of judicial deference to arbitration awards has been well entrenched in both the common law and the U.S. Arbitration Act since before 1960. *See Burchell v. Marsh*, 58 U.S. 344, 349, 15 L.Ed. 96 (1855); 9 U.S.C. §1, *et. seq.* It was not until 1960, however, that this Court decided to comprehensively deal with the subject of judicial review in what has been deemed the *Steelworkers Trilogy*, *supra.* at N.2. The third case of the *Trilogy*, *Enterprise Wheel & Car Corp.*, dealt specifically with the judicial enforcement of an arbitration award and described the standards a court should apply when asked to either enforce or vacate an arbitration award. 363 U.S. 593. It was in the *Enterprise Wheel* case that this Court established the principle that the merits of an arbitration award should not be

judicially reviewed and that vacation of an award is only proper when it does not draw its essence from the collective bargaining agreement.

It is conceded that a disparity existed among the courts in applying the test for arbitrability established in *Enterprise Wheel*. For this reason, this Court, in 1987, undertook to clarify the circumstances under which judicial review of arbitration awards is proper. *Misco*, 484 U.S. 29. In so doing, not only did the Court clarify its earlier opinion but it also upheld the role of the judiciary as an important facet of federal labor-management law by continuing to recognize the need for judicial review of arbitration awards in limited circumstances.

The decisions by the lower courts in the case at hand do not undermine this Court's decisions on the subject. Neither do they "open the floodgates" of judicial review of all routine arbitration awards, as suggested by the Petitioner. The circumstances under which a court may properly review an arbitration award are very narrow and are deemed inapplicable in most instances. The narrowing of these circumstances as proposed by the Petitioner would, in effect, completely foreclose all judicial review of arbitration decisions. While the Petitioner seems to argue that such foreclosure is a better result, arbitrators would then be free to render decisions unchecked by any means and certainly, in this case, out of touch with the terms of the Last Chance Agreement. It is generally recognized that "the arbitrator's role is to decide disputes in accordance with the contract between the parties rather than on the basis of non-contractual considerations or his own subjective notions of fairness or equity. For that reason, few have suggested that judicial review be absolutely foreclosed." 2 T. Bornstein & A. Gosline, *Labor and Employment Arbitration* §51.01 (1992).

It should be noted that this is not a situation in which intercircuit or intracircuit conflicts exist. Likewise, this is not a case

involving an issue of first impression for this Court or for any of the lower courts involved herein. This is nothing more than a garden variety review of an arbitration award, an issue with which an already overburdened Supreme Court should not be burdened. There is nothing novel in this case. The issue is simply whether the arbitral decision drew its essence from the Last Chance Agreement, and it is universally recognized that judicial review of an arbitration award under such circumstnaces is proper.

Furthermore, the notion that the decisions below "open the floodgates" for judicial review of every routine arbitrator's award is meritless. While it is conceded that the current dockets of most federal courts are overburdened, there is no evidence that the judicial review of arbitration awards in the labor-management relations area has contributed to this phenomenon. There is also no evidence that the continued allowance of judicial review will have a "flooding" effect on the courts as the Petitioner suggests. While the Petitioner cites various figures in support of his argument, these figures deal with the increase of civil cases in general and do not specify what percentage is due to the judicial review of arbitration awards. In his report to the Judicial Conference of the United States in September, 1991, the Director of the Administrative Office of the United States Courts, L. Ralph Meacham, reported that the overall increase in appeals from the U. S. District Court was due mainly to a 5% growth in criminal appeals, a 6% growth in state and federal prisoner petitions, and a 15% growth in bankruptcy cases. 1991 ANNUAL REPORT OF DIRECTOR, at 40. While the percentage of administrative agency cases increased in 1991, the number still remains 6% below that of two years ago. *Id.* Besides, the 1991 increase in administrative appeals has been attributed mainly to appeals filed against the Immigration Naturalization Service, which has been attempting to deport those immigrants with criminal records. *Id.* at 82.

More pertinent to the issue at hand is the fact that of all the cases pending before the U. S. Courts of Appeals in 1991, only 247, or less than 1%, dealt with questions arising under the Labor Management Relations Act ("LMRA"), and only 682 cases, or 2%, dealt with any other labor-related question. Furthermore, there was an 8% decrease in the number of cases dealing with the LMRA pending before the U. S. Courts of Appeals from 1991 to 1990. *Id.* at 166-167. As far as the U. S. District Courts are concerned, only 14,686, or 7%, of the cases commenced in 1991 dealt with labor-related issues, and only 2,032, or less than 1%, dealt with cases involving the LMRA. *Id.* at 190-191. A closer look will also reveal that the number of LMRA cases commenced in the U. S. District Courts has steadily declined since 1987, with a 39% decrease from 1987 to 1991.

Year	No. of LMRA Cases Commenced in U.S District Courts	% Changed From Previous Year
1987	3,323	—
1988	2,880	-13
1989	2,525	-12
1990	2,342	- 7
1991	2,032	-13

Id. at 192-193.

As can be seen from the above statistics, there is simply no support for the Petitioner's contention that the U.S. Courts of Appeal have been "merely giving lip-service to the *Steelworkers Trilogy*," (Petition, p. 19), and that such lip-service is somehow attributable to the burgeoning federal caseload. This Court has made it very clear that the judicial review of arbitration awards is proper in only very limited circumstances, and the U. S. Courts

of Appeal and District Courts have consistently followed this principle, allowing review only in very limited circumstances, such as where the award does not draw its essence from the collective bargaining agreement. The number of labor-related cases commenced and pending in federal courts, particularly those involving the LMRA, has steadily decreased over the past five years, and there is simply no indication that this trend will change. Thus, the argument that the routine review of an arbitration award will somehow add to the overburdening of the federal courts is meritless.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney for Respondent acknowledges that three (3) copies of the Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States were served on the following attorney by first-class mail, postage prepaid, on this 2nd day of November, 1992:

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_____

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APPENDIX

APPENDIX A

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2876EMSL

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC.,

Appellee,

vs.

TEAMSTERS LOCAL UNION NO. 688, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Appellant.

On Appeal From the United States District Court
For the Eastern District of Missouri,
HONORABLE JEAN HAMILTON, Presiding

BRIEF OF APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case was filed by Plaintiff-Appellee to vacate an arbitrator's award ordering that a discharged employee be reinstated. Defendant-Appellant filed a counterclaim for enforcement of the arbitrator's award. The case was submitted to the District Court on cross motions for summary judgment. The District Court, Hon. Jean Hamilton presiding, properly vacated the award on the basis that the arbitrator's award did not "draw its essence" from the collective bargaining agreement. Appellee requests twenty minutes for oral argument because the case presents substantial factual and legal issues for the Court's review.

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I. PRELIMINARY STATEMENT

This appeal is from the unreported decision of Hon. Jean Hamilton, United States District Court for the Eastern District of Missouri, issued on June 28, 1991, vacating an arbitrator's award to reinstate an employee discharged pursuant to a last chance agreement. App.[1] Jurisdiction of the District Court was invoked pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, 28 U.S.C. §§ 1331 and 1337, and 9 U.S.C. §10. This Court's jurisdiction is predicated on 28 U.S.C. § 1291.

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[1] "App." herein refers to the Joint Appendix as designated by counsel for Appellant and Appellee.

II. STATEMENT OF THE ISSUE

Did the District Court correctly vacate an arbitrator's award that did not draw its essence from a negotiated last chance agreement?

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 264, 98 L.Ed.2d 286 (1987).

Northwest Airlines, Inc. v. International Ass'n of Machinists and Aero Space Workers, Air Transport Dist. Lodge #143, 894 F.2d 998 (8th Cir. 1990).

Tootsie Roll Indus., Inc. v. Local Union No. 1 Bakery, Confectionery & Tobacco Workers' Int'l Union, 832 F.2d 81 (7th Cir. 1987).

Bakers Union Factory #326 v. ITT Continental Baking Co., Inc., 749 F.2d 350 (6th Cir. 1984).

III. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case was filed by Plaintiff-Appellee on December 14, 1990, seeking to vacate an arbitrator's award ordering the reinstatement of an employee discharged pursuant to a last chance agreement. Defendant-Appellant filed a counter-claim seeking the enforcement of the award. (*See* App. 4-7; 61-64.) The case was submitted to the District Court on Cross Motions for Summary Judgment, and, on June 28, 1991, the District Court issued a Memorandum and Order vacating the arbitrator's award, which the District Court found did not "draw its essence" from the collective bargaining agreement under which the parties were governed. (App. 117-123.) Defendant-Appellant filed a Notice of Appeal out of time by leave of the District Court on July 31, 1991.

B. Statement of Facts

Coca-Cola Bottling Company of St. Louis, Inc. ("Company") is engaged in the production and sale of Coca-Cola and other soft drink products. It employs approximately five hundred (500) employees and has collective bargaining relationships with four (4) labor organizations, including Teamsters Local Union No. 688 ("Union").

As pointed out by the Defendant-Appellant, this proceeding is the result of a series of grievances filed by Kenneth Youngermann, a former employee of the Company. Mr. Youngermann was employed as a driver and was subject to the collective bargaining agreement entered into between the Company and the Union. Pursuant to this collective bargaining agreement, Mr. Youngermann's grievances were submitted to an impartial arbitrator, and ten (10) discrete arbitrations were heard on October 4-6, 1989 and January 30-February 2, 1990. The Arbitrator issued his Opinion and Award on September 17, 1990, which

ordered the reinstatement of Mr. Youngermann because the arbitrator found Mr. Youngermann's discharge to be improper. This conclusion precipitated the filing by the Company of this case now on appeal. (*See* App. 10-60.)

Effective January 18, 1988, the Company implemented its Rules and Regulations and attendant disciplinary procedures, which called for a progressive disciplinary system. These Rules and Regulations establish three (3) categories of violations, each requiring different numbers of violations before termination is warranted. Under the Rules, Category A violations are treated as follows:

First Offense:	Documented counseling warning.
Second Offense::	Written disciplinary warning notification.
Third Offense:	Three (3) day suspension, without compensation.
Fourth Offense:	Ten (10) day suspension, without compensation.
Fifth Offense:	Immediate suspension, without compensation, pending investigation for termination.

(*See* App. 16-21.)

Prior to August 16, 1988, Mr. Youngermann had already received the first four levels of discipline under the five-step procedure for Category A violations. Mr. Youngermann's fifth and dischargeable step was comprised of the following multiple incidents. On August 16, 1988, Mr. Youngermann failed to perform his duties in an efficient manner, resulting in approximately six hours of unwarranted overtime at a rate of $23.17 per hour. On August 17, 1988, Pronto Enterprises, Inc. lodged a complaint with the Company regarding the work performance of

Mr. Youngermann. According to two witnesses, Pronto Enterprises employees Donald Rice and Jeanne Hanneke, Mr. Youngermann threw a "fit" and used profanity in front of customers. Finally, on August 24, 1988, a complaint was received from Wal-Mart Super Center in Washington, Missouri, again regarding Mr. Youngermann's poor work performance. Wal-Mart's Receiving Manager JoAnne Schwoppe, testified that Mr. Youngermann refused to service the store properly and, once again, used profanity in front of customers. Both Pronto and Wal-Mart expressed that they did not want Mr. Youngermann to service their accounts any longer. (*See* App. 28-31.)

On September 6, 1988, a meeting was held with Union Stewards John Becker, Jr. and Gary Tinsley. Attending for the Company were Distribution Manager Jerry Coy, Distribution Superintendent Rick Roustio, and Manager of Human Resources Curt Wacker. During that meeting there was full and complete discussion of the reasons for Mr. Youngermann's impending termination. At the Union's urging, the Company agreed not to terminate Mr. Youngermann but to give him one last chance to reform. Therefore, pursuant to the Union's urging, the Company drafted a disciplinary action notice, which was characterized as a "last chance agreement". (*See* App. 31-32.)

> *Pursuant to the Union's recommendation* on a one time non-precedent setting basis the Company will agree to the following in this situation only: A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that the employee does not have the skill and ability to perform satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production

in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section 1 of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.

Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of next occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its rights in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that a fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis. (*See* App. 21-22.)

This Last Chance Agreement, rather than calling for Mr. Youngermann's termination, provided for a ten (10) day disciplinary suspension and the disqualification of Mr. Youngermann from the position of Extra Relief Driver. The agreement also gave the Company the explicit right to immediately terminate Mr. Youngermann on the happening of any "such offense of a similar and/or like nature" in violation of a Category A Rule or

Regulation. It also spelled out other misconduct which would be prohibited. The document was not only read and signed by Company representatives Rick Roustio and Jerry Coy, but also by Union Stewards John Becker, Jr. and Gary Tinsley. While the Union claimed that Stewards Becker and Tinsley signed only as witnesses, the arbitrator rejected this contention, finding the Union bound to the terms of the Last Chance Agreement. (*See* App. 55.)

Following the execution of the Last Chance Agreement, the Company continued to have problems with Mr. Youngermann's work performance. These problems resulted in a December, 1988, 40-day suspension, without compensation, which was upheld by the arbitrator as justified.

Additional problems following the December 40-day suspension ultimately led to Mr. Youngermann's termination on May 1, 1989. (*See* App. 34-35; 55.) Those events set forth hereinafter which ultimately led to Mr. Youngermann's termination on May 1, 1989, again reflect his inability or unwillingness to comply with job requirements which even the newest employee would find readily achievable. (*See* App. 56-60.) These matters are not before this Honorable Court and are merely recited to allow for a more complete understanding.

The first incident occurred on April 6, 1989, when Distribution Supervisor Steve Juenger was advised by Mr. Youngermann that he did not feel "qualified" to run his route despite years of experience as a delivery driver. Consequently, Mr. Juenger accompanied Mr. Youngermann on his route. On the elementary job duties Youngermann required the direction one would expect of a new hire. Mr. Youngermann had to be directed by Mr. Juenger to take a roll of Norand (computer) paper on his route. Mr. Youngermann took the paper and placed it on the trunk of a parked vehicle. Mr. Juenger asked him to pick it up, to which Mr. Youngermann responded again that he was not qualified to run

the route. Mr. Juenger had to give him a direct order to pick up the roll of paper. Subsequently, at St. Joan of Arc School, Mr. Juenger departed the truck, got the handtruck, and was starting to assist Mr. Youngermann in performing his duties. Mr. Youngermann sat in his truck, refusing to leave, and said, "If Coca-Cola wanted me to have a helper, they would have given me one." When Mr. Youngermann continued to refuse to get out of the vehicle, Mr. Juenger issued a direct order to do so.[2] Only upon being told it was a direct order to get out of the truck, Mr. Youngermann complied. (*See* App. 38-39.)

A second incident occurred on March 28, 1989, when Wal-Mart Store Manager James Carpenter experienced a problem with Mr. Youngermann.[3] Mr. Carpenter testified that he was the Manager of the Wal-Mart store to which Mr. Youngermann made a Coca-Cola delivery on March 28th. Mr. Carpenter testified that he asked Mr. Youngermann if he was going to take the order into the warehouse as usually done. At that point in time it would have meant Mr. Carpenter having to remove the rollers upon which product was being taken from a Wal-Mart truck to the warehouse. Mr. Youngermann responded that ". . . he delivered to the door, and that was as far as it goes". Mr. Carpenter testified he had never had that happen before with a Coca-Cola driver. Mr. Youngermann left the product at the door, and, worse yet, left it in a position that interfered with the Wal-Mart operation. (*See* App. 38-39; 56-57.)

A third situation arose on April 19, 1989, when Mr. Youngermann, along with Steward Becker, was called to a meeting by Distribution Superintendent Roustio. Youngermann's

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[2]We are aware of general prohibitions about supervisors doing bargaining unit work, but given Mr. Youngermann's declarations of ineptitude, compounded by obvious demonstrations of that fact, one can understand Mr. Juenger's desire to help him.

[3]This was documented by a Carpenter memo dated April 11, 1989.

immediate superior, Distribution Supervisor Jeff Ryan, also attended. The evidence is unchallenged, even by the Union, that the purpose of the meeting was remedial, not disciplinary. Mr. Youngermann was handed three (3) memos for instructional purposes which addressed the following issues: the Wal-Mart store incident referenced immediately above; an incident involving Mr. Youngermann spending in excess of one (1) hour and thirty-eight (38) minutes to verify a $2.00 or $3.00 shortage; and his failure to follow two direct orders from Distribution Supervisor Steve Juenger on April 6, 1989, referenced hereinbefore. *See* App. 39; 56-57.) During the meeting Mr. Roustio said Mr. Youngermann became defensive after reading the memorandum. He resisted efforts to use the meeting and memos as positive instructions and opportunities to correct his behavior. After Mr. Youngermann characterized the Company and Mr. Roustio as being ignorant, stupid, and ridiculous, Mr. Roustio, quite candidly testified that he lost his temper and advised Mr. Youngermann he was suspended for "insubordination".

Following that meeting, on April 19th Distribution Supervisor Ryan happened to examine the interior of Mr. Youngermann's vehicle. He found it in total disarray, as depicted in a photo examined by the Arbitrator. Mr. Ryan called Union Stewards Becker and Dick Boss over to examine the truck. They expressed their amazement by one or both inquiring, "Whose truck is this?" (*See* App. 39-43.)

Subsequently, Mr. Roustio learned of other Category A rule violations which had been committed by Mr. Youngermann. He was advised that on April 18, 1989, Mr. Youngermann had failed to punch out at the end of his workday, for which he had been previously warned, and that he had failed to properly fill out a Department of Transportation record. Mr. Youngermann was suspended on April 19, 1989. On April 26, 1989, a Disciplinary Action Notice was filled out, outlining these violations, and a

discharge letter was issued on May 1, 1989.[4] (*See* App. 39-43.) The Company terminated Mr. Youngermann for being in violation of the Last Chance Agreement.

The Arbitrator found that no violation of the Last Chance Agreement had taken place with respect to the condition of Mr. Youngermann's truck did the transposition of numbers on the DOT form. (*See* App. 58.) A violation was found, however, with respect to Mr. Youngermann's failure to clock out at the end of his shift. While the Arbitrator ruled that this violation was *de minimis* and did not warrant discharge, the District Court, on a proper review of the Arbitrator's award, correctly found that the *de minimis* violation was adequate basis for discharge under the terms of the Last Chance Agreement. This appeal was then filed by the Union seeking to reverse the District Court's decision.

IV. SUMMARY OF ARGUMENT

The evidence clearly reveals that the District Court did not exceed the scope of its review in contravention of established precedent of this Court and the United States Supreme Court. The District Court, while unable to address the merits of a dispute, is free to set aside an arbitrator's decision when such decision does not "draw its essence" from the collective bargaining agreement. Such is the case at hand. Finding that the Arbitrator's decision ignored the plain and unambiguous terms of the Last Chance Agreement, the District Court correctly found

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[4]The Union contends that the arbitrator found a "hit list" of employees to have been maintained. (Appellant's Brief p. 4.) That is not true. (App. 54) Union witness James Krueger testified about a "hit list" maintained by the Company. That was vehemently denied by the management witnesses during arbitration. Mr. Krueger's testimony regarding that point should be viewed as coming from a wholly unbelievable witness. The evidence presented at arbitration showed that Mr. Krueger denied having drafting certain comprising documents. This denial was flatly rejected by witness William Storer, a renowned hand writing expert.

that it did not draw its essence from the agreement. Therefore, the District Court's judgment should be affirmed.

V. ARGUMENT

A. Preliminary Remarks: The Law of the Case

The United Sates Supreme Court has made it clear that judicial review of arbitration awards is very limited. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 264, 98 L.Ed.2d 286 (1987); *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Union Workers*, 430 U.S. 243, 253-54, 97 S.Ct. 1067, 51 L.Ed.2d 300, *reh'g denied*, 430 U.S. 988, 97 S.Ct. 1689, 52 L.Ed.2d 384 (1977); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). It is generally recognized that courts may not "reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Misco, Inc.*, 484 U.S. at 36. Rather, the courts must give deference to an arbitrator's award unless the award fails to draw its essence from the collective bargaining agreement. *Id.*; *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. Thus, where an arbitrator's award has a rational basis rooted in the governing collective bargaining agreement, it should not be overturned, regardless of the fact that the court may have decided differently had it considered the matter in the first instance. *Nolde Bros., Inc.*, 430 U.S. at 253-54. An award will not be found to have drawn its essence from the collective bargaining agreement, however, where the arbitrator has acted in excess of the authority granted to him by the collective bargaining agreement, *Bakers Union Factory, #326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350, 353 (6th Cir. 1984), or where the award is merely the arbitrator's "own brand of industrial justice," *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

The above-mentioned principle reflects the strong federal policy favoring the private settlement of labor disputes. *Misco,*

Inc., 484 U.S. at 37. This policy is clearly set forth in the Labor Management Relations Act, which provides that:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

29 U.S.C. §173(d) (quoted in *Misco, Inc.*, 484 U.S. at 37). The notion that this policy merely favors the finality of arbitration awards, however, is too narrowly drawn. As the United States Court of Appeals for the Sixth Circuit said:

> The policy in favor of the finality of arbitration is but one part of a broader goal of encouraging informal, i.e., nonjudicial, resolution of labor disputes.
>
> > It is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, federal labor policy encourages that procedure no less than arbitration.

Bakers Union Factory, #326, 749 F.2d at 353 (quoting *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3d Cir. 1977)).

Thus, while the Union is correct in pointing out that parties who have bargained for an arbitrator's interpretation of a contract should not be deprived of such interpretation, "[p]arties who reach a settlement pursuant to a formal grievance procedure have not bargained for an arbitrator's construction of the collective bargaining agreement: they have bargained for their own construction." *Id.* at 354. From this it only follows that when the parties' obligations are controlled by a settlement agreement, i.e., a Last Chance Agreement, "the policy in favor of the finality

of arbitration must yield to the broader policy in favor of the parties' chosen method of non-judicial dispute resolution." *Id.*

B. Last Chance Agreement

There is no doubt that the dispute involved in the case at hand is governed by the Last Chance Agreement signed by the Company *and the Union* on September 6, 1988. This agreement was clearly meant to override the terms of the collective bargaining agreement with respect to any further violations including, but not limited to, Category A rule violations by Mr. Youngermann. The Last Chance Agreement clearly states that the Company considers a "continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination (sic) of next occurrence" or "any such offense of a similar and/or like nature in violations (sic) of a Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis". (*See* App. 8-9.) There is no requirement that just cause exist or that the violation be more than *de minimis*. Furthermore, the contention that the Last Chance Agreement did nothing more than set forth the Company's rights under the collective bargaining agreement is ludicrous. As the District Court pointed out, it would have been pointless to execute the Last Chance Agreement if such contention were true. Rather, the Last Chance Agreement was intended *by both parties* to give Mr. Youngermann a final chance to perform satisfactorily before termination, in return for the Company's ability to terminate Mr. Youngermann for *any* future violation not subject to a "just cause" test.

Several courts, including this one, have recognized that Last Chance Agreements supersede the provisions of a collective bargaining agreement, and any just cause provisions. *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aero Space Workers, Air Transport Dist. Lodge #143*, 894 F.2d 998

(8th Cir. 1990); *Tootsie Roll Indus., Inc. v. Local Union No. 1 Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81 (7th Cir. 1987); *Bakers Union Factory, #326*, 749 F.2d 350. When an arbitrator has been called upon to apply such an agreement to a dispute, he or she is not free to ignore the plain, unambiguous language of its provisions. *Misco*, 484 U.S. at 38; *Northwest Airlines, Inc.*, 894 F.2d at 1000. Likewise, while it is within the arbitrator's authority to determine whether the terms of a Last Chance Agreement have been breached, *Bakers Union Factory, #326*, 749 F.2d at 356, it is *not* within the arbitrator's authority to amend or alter the agreement, *Northwest Airlines, Inc.*, 894 F.2d at 1000. More specifically, where an agreement plainly and unambiguously sets forth a penalty for particular misconduct, the arbitrator may not ignore the penalty provided for and fashion his own remedy, even if he or she feels that the penalty provided is inequitable or unduly harsh. *Northwest Airlines, Inc.*, 894 F.2d at 1000; *Contico Int'l, Inc. v. Local 160, AFL-CIO*, 135 L.R.R.M. 209 (E.D. Mo. 1990); *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood, Local 6 of International Alliance of Theatrical Stage Employees & Moving Picture Operators of U.S. and Canada*, 543 F. Supp. 1 (E.D. Mo. 1981), *aff'd*, 715 F.2d 405 (8th Cir. 1983).

Under this rationale, the United States Court of Appeals for the Seventh Circuit in *Tootsie Roll Indus., Inc.*, 832 F.2d 81, declined to give deference to an arbitrator's decision awarding reinstatement of an employee discharged pursuant to a last chance agreement. There, the last chance agreement was entered into in lieu of terminating the employee for excessive absenteeism. Under the agreement the employee was to maintain an acceptable attendance level, and the number of permitted absences was specifically stated. The arbitrator, however, refused to apply the plain terms of the agreement. Rather, he referenced the more lenient attendance policy provided for in the collective bargaining agreement and ordered the employee's reinstatement. The court held that the arbitrator's decision did not draw

its essence from the last chance agreement. Specifically, the court provided that:

> We agree with the district court's finding that the arbitrator's conclusion that all aspects of Tootsie Roll's regular attendance policy must apply to the Last Chance Agreement does not draw its essence from the agreement. We are convinced that in using the general attendance policy to find [the employee's] absences excusable, the arbitrator based his award on a policy outside the letter agreement. *In fact, if the parties had intended the regular policy to apply, there would have been no reason for spelling out the very specific attendance requirements contained in the letter agreement* and they would have written such language into the contract with specificity had they so intended. The effect of the arbitrator's conclusion was to eliminate the agreement's provision that [the employee] would be terminated if she was absent "for any reason whatsoever." Thus, the district court properly refused to enforce the arbitrator's award because he failed to follow the clear requirements of the agreement.

Id. at 83-84 (emphasis added).

The Eighth Circuit has also reversed arbitration awards where relevant language in a settlement agreement was not considered by the arbitrator. *See Northwest Airlines, Inc.*, 894 F.2d 998; *see also George A. Hormel & Co. v. United Food & Commercial Workers, Local 9, AFL-CIO*, 879 F.2d 347 (8th Cir. 1989) (dealing with language in collective bargaining agreement); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988) (finding that arbitrator disregarded plain, unambiguous language in collective bargaining agreement). In *Northwest Airlines, Inc.*, the company had been ordered to reinstate the employee pursuant to an arbitration award unrelated to the one then at issue before that court. 894 F.2d 998. The employer

refused to do so because the employee, an equipment service operator, did not have a valid driver's license. The parties thereafter agreed, however, to enter into a settlement agreement offering reinstatement upon the obtainment of a license. Failure by the employee to obtain a license was to be treated as a voluntary resignation. The employee failed to obtain a valid driver's license, and the company treated this as a voluntary resignation pursuant to the settlement agreement. The dispute was submitted to an arbitration board, which found that "the settlement agreement arose out of an arbitration award reinstating [the employee] and that the award dealt with discharge under the 'just cause' provision of the collective bargaining agreement." *Id.* at 999. Determining that the employee had not violated the intent and purpose of the settlement agreement, the arbitration board ordered reinstatement. After recognizing the general principles highlighted earlier, the Court of Appeals pointed out that the terms of the settlement agreement were plain and unambiguous and that the arbitration board, by disregarding those terms, acted without authority. Thus, the award was vacated. *Id.* at 1000.

Likewise, in *Sears, Roebuck & Co. v. Automotive, Petroleum and Allied Indus. Union, Local No. 618*, 570 F. Supp. 650 (E.D. Mo. 1983), the court found that an arbitrator's decision, which reduced an employee's penalty from discharge to suspension, did not draw its essence from the contract. In *Sears, Roebuck & Co.*, an employee was discharged because of rude and discourteous behavior towards customers. 570 F.Supp. 650. The employee grieved his discharge and was reinstated under the terms of a last chance agreement providing for immediate termination upon "any reoccurrence of discourteous and rude treatment of customers or obscene and disrespective or subordinate actions with management." *Id.* at 652. The employee was thereafter found to have engaged in the prohibited conduct and was fired. The arbitrator found that the employee had in fact engaged in the

prohibited conduct, violating the last chance agreement, but that the employer was not justified in terminating him. After reviewing the law concerning a court's scope of review, the court found review in this instance appropriate. The court pointed out that, once the arbitrator determined that the agreement had been violated, he "was without authority to determine the appropriate punishment." *Id.* at 653.

> The penalty, by agreement of the parties, is discharge. The number of credible complaints, which the board here found to be a mitigating circumstance, is irrelevant because the letter provides that "[a]ny reoccurrence . . . will result in" discharge.... In ruling that discharge was an inappropriate punishment, the board exceeded its authority and "dispense[d its] own brand of industrial justice."

Id. at 653-654 (quoting *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597). The court also rejected the notion that the last chance agreement required "proper cause" to discharge, finding that the agreement specified the conduct giving rise to termination. Thus, the arbitrator's award was vacated.

As to the case at hand, the thrust of the Union's position is that the Last Chance Agreement executed by Stewards Becker and Tinsley was a nullity. Their claim that they signed merely as witnesses is belied by the plain language of the agreement, the evidence surrounding the meeting in which it was negotiated and signed, and by testimony that negotiated last chance agreements were not uncommon. In fact, the Arbitrator found that the Agreement was valid and binding upon the parties, rejecting the Union's contention. The Union would also have the Court believe that the Last Chance Agreement was not, in fact, a "Last Chance" Agreement. That, too, is wholly unsupported by the facts. The Last Chance Agreement, if not but another step under contractual progressive discipline, must mean something. It is asinine to think it means a sixth step in progressive discipline as the Union would have the Court conclude.

Because the answer is axiomatic, there are few arbitral decisions addressing the authority of unions to negotiate last chance agreements which bind disgruntled or objecting employees. However, in *Sorg Paper Co.*, 89 LA 1237 (Dworkin, 1987), that issue was squarely addressed. There, the employer terminated grievant, relying upon a last chance agreement negotiated with the union. Thereafter, the effectiveness of the last chance agreement was questioned. Arbitrator Dworkin, in addressing whether or not a collective bargaining representative could negotiate away an employee's right to discipline under a "just cause" test, stated the following

> . . . It is apparent to the Arbitrator that the Company's action in this case would not normally withstand critical examination of proper cause. The decision to terminate grievant was mechanical.
>
> * * *
>
> In the abstract, Grievant did not receive the full benefit of proper cause. However, the last-chance decision of the Discipline Control Board [union and management composition] redefined and diminished Grievant's entitlement to proper cause for a probationary year. *Since the decision of the Board constituted a bilateral, negotiated impairment of the Grievant's contractual employment rights, the question to be answered is whether the Company and the Union, acting in concert, were empowered to single out any employee for impaired rights.*
>
> If the Arbitrator were to decide that Grievant was entitled to a full measure of proper cause regardless of what the Discipline Control Board decided, he would effectively abolish the Board. Moreover, he would implicitly hold that no last-chance agreement is valid. The Arbitrator declines to so rule. *Last-chance agreements permit employees to escape terminal discipline provided certain defined condi-*

> *tions are met. Were it not for the negotiated arrangement, Grievant probably would have been justifiably dismissed in December, 1985. Instead, the Company and the Union mutually agreed to an alternative - Grievant's right to demand that the substantive proper cause attend all discipline was sacrificed in exchange for continuing his employment.*
>
> *The parties are entitled to negotiate such resolutions. Proper cause, like any benefit of employment, can be reduced or eliminated through voluntary bargaining. There is nothing sacrosanct about proper cause which exalts it above all other working conditions. It is subject to change through negotiations.*
>
> Grievant did receive some element of proper cause. He was given double-barreled counseling during his probationary period; both supervision and union representatives participated. Every time he was issued a warning he was reminded he was moving closer to losing his job.

Sorg Paper Co., 89 LA at 1241-42 (emphasis added).

The thrust of Arbitrator Dworkin's decision, which is well recognized, is that last chance agreements may entitle an employer to deny an employee the just cause entitlements of the typical labor contract. Once at the termination stage, the employer is faced with an option of discharging the employee or negotiating a special agreement. The grieving employee may not sit back and later seek the best of both worlds, *i.e.*, accept the benefits of a negotiated continued employment under a last chance agreement and yet grieve the very agreement that allows him to maintain his conditional employment status. *See also Scooba Mfg. Co.*, 90-1 ARB ¶81,061 (Hart, 1989) (specially negotiated attendance program for grievant not applicable to other employees permissible – discharge grievance denied).

On September 6, 1988, Mr. Youngermann was to have been terminated, having incurred the fifth (5th) step of progressive discipline — discharge. As found by the arbitrator, the Last Chance Agreement was negotiated, hand drafted, and thereafter typed and executed by Manager of Human Resources Curt Wacker and the Union. The Last Chance Agreement clearly contained, in bold print, the heading "Final Notification," following which was precise language calling for termination for the violation of *any* Category A rule. It also contained a litany of other proscribed conduct. Had the parties merely intended to reiterate their rights under the collective bargaining agreement, all of this would have been unnecessary. On the contrary, actions were taken to deliberately supersede any rights or provisions contained in the collective bargaining agreement. The Last Chance Agreement embodies those actions and is binding on all parties.

There is little question that Mr. Youngermann did not sign the document and, likely, did not concur with the negotiated resolution. But, as found by the arbitrator, that is not the issue. The issue is whether or not the Union, as the certified collective bargaining representative, can negotiate Last Chance Agreements or special arrangements for employees they legally represent. Clearly, the answer is yes. Rules of conduct, collective bargaining agreements, and a host of disciplinary and working condition matters routinely are negotiated by unions with a view to satisfying only a majority of employees. If disgruntled employees may avoid the bargain struck by collective bargaining representatives merely because they do not like it, anarchy has indeed come to the workplace. Here, but for the Last Chance Agreement on September 6, 1988, Mr. Youngermann would have been terminated effective that date. Mr. Youngermann took the benefit of the bargain negotiated by Stewards Becker and Tinsley only to thereafter undercut their authority and the agreement. Candidly, if the approach by this Union is that the

Last Chance Agreement has no legal efficacy and is not binding on them, then it is submitted that effective September 6, 1988, the date of the Last Chance Agreement, Mr. Youngermann was terminated. He and the Union cannot have it both ways.

Under the terms of the Last Chance Agreement, the arbitrator incorrectly limited its range to Category A violations. He ignored the explicit language in the second paragraph which sets forth other proscribed conduct, *e.g.*, poor work performance, carelessness, etc. Moreover, District Court Judge Hamilton in the interest of economy did not address the issues of Mr. Youngermann's trash-filled vehicle or the failure to properly fill out a Department of Transportation form. The arbitrator summarily dismissed them as either having been committed by other employees as well (truck) or as insignificant violation (DOT). (*See* App. 58.) There, too, the test under the Last Chance Agreement is whether the act was committed not whether "just cause" may be examined.

The Union also argues that, even if the Last Chance Agreement is valid and binding, which it was found to be by the Arbitrator, it does not supersede the just cause provisions in the collective bargaining agreement. This contention is contrary to the law previously cited and to the facts of this case. The parties negotiated this agreement at the Union's "recommendation", in an effort to accommodate Mr. Youngermann. Such negotiation would have been pointless had it not been meant to afford more rights than were afforded under the collective bargaining agreement. The Last Chance Agreement clearly provides that termination is justified once *any* Category A violation is found.[5] This provision, as the District Court correctly found, is plain and unambiguous. There is no "just cause" requirement and no requirement that more than a *de minimis* violation be found.

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[5] As pointed out, that view, correct as it is, does not address the prohibitions included in the second paragraph of the Last Chance Agreement.

Thus, the Last Chance Agreement did provide for more rights than those provided for in the collective bargaining agreement — it provided for Mr. Youngermann's continued employment and the Company's right to terminate him without just cause. The Union could have refused the Last Chance Agreement on September 6, 1988 and arbitrated Mr. Youngermann's termination which otherwise would have been effective that date. It and Mr. Youngermann chose not to and now seek to emasculate the Last Chance Agreement, the fruits of which they accepted for seven (7) months.

The Arbitrator's sole authority was to determine whether a breach of the Last Chance Agreement took place. This breach was found. The Arbitrator correctly found that Mr. Youngermann's failure to clock out was a violation of Rule A-10. (*See* App. 58-59.) This is where the arbitrator's authority ceased, and his finding that the violation of the rule was *de minimis* is irrelevant. *See Tootsie Roll Indus., Inc., supra.* An arbitrator is not free to fashion a remedy where an exclusive remedy, in this case termination, is mandated. The Last Chance Agreement provided for an exclusive remedy — termination. Therefore, the Arbitrator exceed his authority when he ordered the reinstatement of Mr. Youngermann, and the review of his decision was properly before the District Court.

VI. CONCLUSION

The Arbitrator exceeded his authority by fashioning a remedy where an exclusive remedy was provided. The Arbitrator, after finding a violation of Rule A-10, was not free to substitute his judgment as to what punishment was appropriately for the exclusive judgment of the parties. His doing so led the District Court to properly and correctly conclude that the Arbitrator's decision did not draw its essence from the contract, making the District Court's review. Therefore, the District Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies of the Brief of the Appellee were mailed by ordinary mail on this 23rd day of November, 1991 to the following attorney of record for Appellant.

Clyde E. Craig
Robert K. Sweeney
900 Walnut Street, Suite 520
St. Louis, Missouri 63102

This 23rd day of November, 1991.

MILLER & MARTIN

By: /s/ Ronald G. Ingham
Ronald G. Ingham

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 90-2344-C-7

COCA-COLA BOTTLING COMPANY OF
ST. LOUIS, INC.,
Plaintiff,

v.

TEAMSTERS LOCAL UNION NO. 688, affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO,
Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now Coca-Cola Bottling Company of St. Louis, Inc. and, pursuant to Federal Rules of Civil Procedure, Rule 56, files this motion for summary judgment and says:

(1)

The award issued by Arbitrator Josef Rohlik dated September 17, 1990, did not draw its essence from the collective bargaining agreement and/or the Grievant's last chance disciplinary agreement duly executed by the Union.

(2)

Arbitrator Josef Rohlik concluded that certain conduct was committed by Grievant, but that such conduct did not meet the "just cause" test as set forth in the collective bargaining agreement.

(3)

Under the Last Chance Agreement, which supplanted the "just cause" test of the collective bargaining agreement, the Union, Grievant, and Company agreed that "any" future conduct violation of the Company's Rules of Conduct by Grievant would warrant immediate discharge.

(4)

Arbitrator Josef Rohlik's conclusion that Grievant's admitted failure to punch out in violation of Rule A-10 was to be excused because other employees had done likewise, and the Grievant had "alerted" management of his rule violation before they became aware of such conduct ignores the fact the Last Chance Agreement and Rule A-10 were breached, and, consequently, the award does not draw its essence from that Agreement.

(5)

Arbitrator Josef Rohlik's award violates a well defined public policy by ignoring Department of Transportation regulations that Company vehicle records be properly maintained by employees. The Arbitrator's conclusion that Grievant's "inadvertent transposition" of vehicle numbers on the Department of Transportation documents was not sufficient to be violative of Company Rule A-18 flies in the face of government regulations and public policy. Both the Last Chance Agreement and Rule A-18 were breached, and, consequently, the award does not draw its essence from that agreement.

(6)

Arbitrator Josef Rohlik found that Grievant's truck had not been properly maintained, but that the employer had a mixed history of disciplining or not for such conduct violative of Rule A-1. Such conclusion does not draw its essence from the Last Chance Agreement.

(7)

It is respectfully submitted that under the Last Chance Agreement the Arbitrator's authority was limited to determining whether or not certain conduct had occurred. His authority did not extend to examining whether mitigating circumstances existed; whether there was "just cause" for the termination; whether Grievant's rule violation was an inadvertency; and whether Grievant's violation was *de minimis*.

(8)

Plaintiff submits there is no genuine issue of material fact which would warrant a trial of this matter.

WHEREFORE, Plaintiff submits its motion for summary judgment be granted for the reasons set forth hereinbefore and in the brief in support thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiff's Motion for Summary Judgment ~~on Counterclaim and in Support of its Cross Motion for Summary Judgment~~ (/s/ JJM) has been served by first class, prepaid postage upon the below-listed party this 12th day of March, 1991:

Clyde E. Craig, Esq.
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/s/ John J. Moellering
John J. Moellering
Attorney for Plaintiff

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 90-2344-C-7

COCA-COLA BOTTLING COMPANY OF
ST. LOUIS, INC.,
Plaintiff,

v.

TEAMSTERS LOCAL UNION NO. 688, affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO,
Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM AND IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff filed the instant complaint with the Court to set aside a decision of Arbitrator Josef Rohlik under a collective bargaining relationship with Teamsters Local 688 (Teamsters) reinstating a former employee (Grievant) with back pay. Defendant answered and counterclaimed seeking an order enforcing Arbitrator Rohlik's decision. Thereafter, Defendant filed the instant motion for summary judgment, the opposition to which is the subject of this brief. Plaintiff has this date filed its own Motion for Summary Judgment and respectfully submits this brief in support thereof.

Defendant's motion for summary judgment on the counterclaim appears to be based on an unsupported assertion that the

Arbitrator's decision drew its "essence" from the labor agreement and/or there is no dispute as to any material fact. (See motion for summary judgment ¶5 and ¶6.) More is required for the granting of a motion for summary judgment, it is respectfully submitted, than to make bland assertions such as that.

STATEMENT OF THE CASE

Plaintiff has moved to set aside Arbitrator Rohlik's decision based on the fact that a separate agreement or extension of the labor contract had been entered into by Teamsters Local 688 and Coca-Cola Bottling Company of St. Louis under which the Grievant was not entitled to an arbitrator's just cause determinations. Under the "Last Chance Agreement," the arbitrator's authority was limited to determination of whether or not "any" conduct violative of the collective bargaining agreement had been committed.

Informative, although not dispositive of this proceeding, the arbitrator concluded that the Grievant was in fact an "outright bizarre" employee (see arbitral decision, Defendant's Exhibit W, p. 14); that the Company and the discharged employee had been "mismatched" (see arbitral decision, Defendant's Exhibit W, p. 38); that the discharged employee was "generally an uncooperative employee" interested in "endless quarrelling" (see arbitral decision, Defendant's Exhibit W, p. 38); and that the arbitrator had reason to "doubt his ability to be a truck driver" (see arbitral decision, Defendant's Exhibit W, p. 39). Such behavior led to a Last Chance Agreement which was the issue before Arbitrator Josef Rohlik and is now before this Court.

Notwithstanding the characterization of the discharged employee, the arbitrator found, contrary to the "Last Chance Agreement", that Plaintiff did not have "just cause" to terminate the employee which simply missed the issue before him. As will be set forth more fully hereinafter, that position flies in the face of the Last Chance Agreement found to have been duly negotiated

with the discharged employee's collective bargaining representative. In essence, the arbitrator's decision not only didn't draw its "essence from the collective bargaining agreement," it plainly *violated* the supplemental collective bargaining agreement negotiated between the parties relating specifically to Grievant's employment relationship with the Company, *i.e.*, Grievant's Last Chance Agreement. It is unquestioned that if the essence of the arbitrator's award is from the Last Chance Agreement, then this Court may not impose its view although it may have reached a different result in the first instance. See *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). On the facts presented and arguments hereinafter, we think the award drew its essence from the arbitrator not the Last Chance Agreement.

Indeed, the Plaintiff framed this issue before the Arbitrator in its pre-hearing brief to wit:

> "The Company takes the position that the September 6, 1988 'last chance' settlement agreement obviates the need to litigate earlier disciplines, and under the teachings of *Sorg Paper Co.*, 89 LA 1237 (Dworkin 1987); *Inland Container Corp.*, 91 LA 544 (Howell 1988) and *Pratt & Whitney Aircraft Group*, 91 LA 1014 (Chandler 1988), the parties bargained for and agreed on a 'last chance' employment relationship. Proof of any subsequent infraction warrants termination without any just cause inquiry." (See Defendant's Exhibit T, p. 7.)

The "Last Chance Agreement" which the arbitrator found was duly negotiated with Defendant as the "exclusive bargaining agent of the Grievant," and specially found legally efficacious, reads as follows in pertinent part:

FINAL NOTIFICATION

> Any such offense of a similar and/or like nature in violation of Category A Rules and Regulations will warrant your

termination of employment with Coca-Cola Bottling Company of St. Louis.

Arbitrator Rohlik characterized the Last Chance Agreement as follows:

> "All of this [prior disciplines leading to the last chance agreement] evidences the reasonableness of the September 6 solution from what must have been the union point of view. The (sic) December document was also signed by the stewards on the reverse side. The text of the document is unmistakable; it is an agreement between the company and the union on resolution of the situation [impending discharge] which prompted the September 6 meeting." (See arbitral decision, Defendant's Exhibit W, p. 46.)

Following the September 6, 1988 Last Chance Agreement, Grievant engaged in certain conduct which was presented to the arbitrator as the triggering event(s) under the Last Chance Agreement. It was alleged by the Company that Grievant perpetrated the following acts:

(1) On April 18, 1989, he failed to clock out.

(2) On April 19, 1989, he had failed to properly maintain the cleanliness of his truck.

(3) On April 14, 1989, he failed to properly fill out a Department of Transportation form. (See arbitral decision, Defendant's Exhibit W, p. 30.)

The infractions set forth immediately above relate to the following rules of conduct:

> *Rule A-10* - Employees must punch out their time cards when leaving the plant during work time. Time cards must be punched in daily when entering and leaving the building.

Rule A-1 - Each employee is responsible for the orderliness of the area or assigned vehicle in which they work and is asked to keep it clean at all times.

Rule A-18 - Failure to use designated safety devices, equipment, requirements or procedures is strictly prohibited at all times.[1]

Arbitrator Rohlik found that Grievant had in fact failed to punch out his time card, but because he had "alerted" his supervisor to the violation of Rule A-10 after-the-fact, the violation was "de minimis". (See arbitral decision, Defendant's Exhibit W, p. 32 and 50.) Under the September 6, 1988 Last Chance Agreement, the conduct occurred and the rule was violated or it wasn't. The Union's Chief Steward testified he knew of three (3) employees who received disciplinary warnings for not clocking out. Indeed, Grievant himself had been earlier warned. (See arbitral decision, Defendant's Exhibit W, p. 34.)

Arbitrator Rohlik drew the following conclusions with respect to the Grievant's alleged failure to properly maintain his vehicle in violation of Rule A-1:

> "The issue of trash in the cab of the Grievant's truck as a violation of Rule A-1 represents a judgmental matter. Ryan [supervisor] testified that he had seen trucks in such disarray before.[2] (See arbitral decision, Defendant's Exhibit W, p. 49.)

The Union's Chief Steward testified he knew of two (2) employees who had received disciplinary counseling for failure

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[1] (See Defendant's Exhibit B, Rules and Regulations which are not all-inclusive.)

[2] The Arbitrator was shown a picture of the cab's condition (see arbitral decision, Defendant's Exhibit W). Further, there was evidence that other employees have been disciplined for similar conduct.

to maintain clean vehicles. (See arbitral decision, Defendant' Exhibit W, p. 34.)

Arbitrator Rohlik concluded that Grievant had in fact failed to fill out the Department of Transportation form but not as the Company had originally thought. He thereafter stated:

> "Company Rule A-18 requires more than an inadvertent transposition of figures to be involved." (See arbitral decision, Defendant's Exhibit W, p. 49.)

The rule has been applied to direct that employees properly fill out the Department of Transportation form. It is clear from the exhibits submitted by Defendant that Grievant had been previously disciplined for such failure (Defendant's Exhibit R-2). Indeed, Arbitrator Rohlik found that "employees have been disciplined for failure to fill in DOT forms. (See arbitral decision, Defendant's Exhibit W, p. 34.) In fact, Plaintiff's Manager of Human Resources, Curt Wacker, who is charged with Department of Transportation responsibilities, has testified that the inadvertency of errors is no defense (see Wacker Affidavit). Further, directives were sent to all delivery personnel readvising them of the Department of Transportation obligations and the fact that the Company Rules A-18 must be followed (see Wacker affidavit).

For the reasons set forth hereinafter, the Arbitrator was bound by the terms of the negotiated Last Chance Agreement and within the four corners of that document was not empowered to determine whether Grievant's conduct was "de minimis" or others had violated a similar rule with impunity or even whether the decision to discipline was "judgmental". His authority is limited to determining whether or not Grievant's conduct contravened the rule(s).

ARGUMENT AND LEGAL PRECEDENT

In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Supreme Court revisited the circumstances under which arbitral decisions shall be set aside. It reaffirmed that as long as the *essence* of the award came from the labor agreement and is not simply the arbitrator's brand of "industrial justice" the award would not be set aside. See also *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The issue here is whether Arbitrator Rohlik drew his decision from the essence of the Last Chance Agreement. As before stated, Arbitrator Josef Rohlik found, as have myriad arbitrators, that last chance agreements can and, in fact, do supersede the just cause provisions of a collective bargaining agreement. See *Sorg Paper Co.*, 89 LA 1237 (Dworkin 1987); *Inland Container Corp.*, 91 LA 544 (Howell 1988); *Pratt & Whitney Aircraft Group*, 91 LA 1014 (Chandler 1988); and *Schafer Bakeries, Inc.*, 89-1 ARB ¶82,052 (Cole 1988). The issue to be resolved is whether under these facts Arbitrator Rohlik drew the essence of his decision from the Last Chance Agreement before him.

This Court has examined whether an arbitrator's decision draws its essence from a labor agreement or whether the arbitrator has simply ignored the plain contract language. See *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416 (8th Cir. 1986).

More precisely, in *Sears v. Teamsters Local 618*, 570 F.Supp. 650 (E.D. Mo. 1983), this Court examined the issue of whether an arbitrator drew the essence of his decision from a last chance agreement. There, the grievant had been discharged and returned to work under a last chance agreement between the union and employer. The agreement stated that:

> "Any reoccurrence of discourteous and rude treatment of customers or obscene and disruptive (sic) or subordinate

(sic) actions with management will result in immediate dismissal with no further warnings."

The court found that once the arbitrator drew *factual conclusions* that certain conduct had been committed by the grievant *he could not weigh mitigating circumstances* to reduce the discharge to a five (5) day suspension. The court said:

> "The board found that the letter agreement was valid and part of the contract. These conclusions are both rational and correct. *By the terms of the letter, then, once the board determined that grievant had in fact been rude and discourteous to customers, the board was without authority to determine the appropriate punishment. The penalty, by agreement of the parties, is discharge.* The number of credible complaints, which the board here found to be a mitigating circumstance, is irrelevant because the letter provides that '[a]ny reoccurr- ence... will result in' discharge. Arb. Op. at 2. In *ruling that discharge was an inappropriate punishment, the board exceeded its authority and 'dispense[d its] own brand of industrial justice.' United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960). Therefore, the board's decision did not draw its essence from the contract between the parties and must be vacated." (Emphasis added)

In the *Sears* case the arbitrator imposed less than discharge, because the grievant did not understand the last chance letter to still be in force and effect; that grievant's supervisor never warned him that more customer complaints would result in discharge; and that two of three "triggering" complaints about grievant's rude conduct were not "credible." The arbitrator said that if there had only been one complaint he did not believe grievant would have been discharged, and two of the three customer complaints should be discounted because they came

from persons with "standards higher than normal." This court flatly rejected that, concluding the arbitrator simply exceeded the contract and dispensed his own brand of industrial justice. See also, *Northwest Airlines, Inc. v. International Associa tion of Machinists and Aerospace Workers, Air Transport District Lodge #143*, 894 F.2d 998 (8th Cir. 1990).

In the instant case, the Last Chance Agreement recited that:

FINAL NOTIFICATION

> *"Any such offense of a similar and/or like nature in violation of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis."* (Emphasis added)

Arbitrator Rohlik, as before stated, found that certain events occurred for which others had received discipline and on occasion others had not, but that circumstances extant in grievant's case led to the conclusion of no violations or *de minimis* violations.

It is clear that once the Arbitrator found that Grievant failed to punch out in violation of Rule A-10, the inquiry should have ended. It is beyond his authority to opine that Grievant had earlier advised his supervisor that others were not discharged for similar conduct; and that no one raised the subject during a union/management meeting with grievant on April 18th. Rule A-10 says failure to punch in or out is a violation of the negotiated rules of conduct. That decision did not draw its essence from the Last Chance Agreement. The arbitrator simply drafted his own rule that employees may fail to clock out with impunity if they advise supervisors *before* it is discovered. The Court should be mindful that Grievant had received earlier discipline for similar misconduct. (See Defendant's Exhibit R-2.)

It is equally clear that once the Arbitrator found that Grievant's truck had not been maintained in an orderly fashion, the inquiry should have ended. His gratuitous observations that other trucks had been observed in similar condition goes beyond the precise terms of the Last Chance Agreement. Moreover, even under the terms of the collective bargaining agreement encompassing "just cause" concepts, the Union conceded discipline had been issued. (See arbitral decision, Defendant's Exhibit W, p. 34.) The arbitrator's decision that other trucks had been in similar condition thereby excusing such conduct by Grievant simply did not draw its essence from the Last Chance Agreement.

Finally, the Arbitrator's conclusion that the Department of Transportation form had not been filled out properly by Grievant, but not as originally thought by the Company, was not a violation, and was nothing but an "inadvertent transposition" of figures goes well beyond the Last Chance Agreement and federal regulations. The Department of Transportation regulations, as the Court is asked to take judicial notice, require that forms be filled out properly or the employer may be found in violation and fined. Neither the regulations nor the Company rules make an allowance for "inadvertent transpositions". Once having found that Grievant failed to properly fill out a Department of Transportation form, the Arbitrator's authority under the Last Chance Agreement has been exhausted. Any decision ranging beyond that into the equities of the situation similarly does not draw its essence from the Last Chance Agreement.[3]

Further, with respect to the Department of Transportation regulations, under the teachings of *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), as restated in *Misco*, *supra*, arbitral decisions are subject to being set aside if such contravene a well defined public policy. The public policy of employers

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[3] Indeed, even the Union Chief Steward was strict but fair in administering discipline. (See arbitral decision, Defendant's Exhibit W, p. 45.)

being required to maintain, manage and present to the public safe and well maintained fleets of vehicles is beyond question. The U.S. Department of Transportation has that as its primary objective. Toward that end each employer and employee has recordkeeping responsibilities which, if breached, can result in fleets of vehicles being grounded. (See Wacker Affidavit and Exhibit No. 1 thereto.) Grievant breached his personal obligation under the D.O.T. regulations and resultantly so did the Company. The courts have recently become more sensitive and assertive in refusing to enforce arbitral awards where the arbitrator has imposed his own brand of industrial justice breaching a well defined public policy. See *Georgia Power Co. v. Electrical Workers IBEW, Local 84*, 707 F.Supp. 531, 130 LRRM 2419 (D.C. Ga. 1989) (well defined public policy of operating machinery safely breached by award reinstating drug user); *Russell Memorial Hospital Assn. v. Steelworkers*, 720 F.Supp. 583, 132 LRRM 2642 (D.C. Mich. 1989) (well defined public policy of providing safe and competent nursing care breached by award reinstating negligent nurse); *Iowa Electric Light & Power Company v. Electrical Workers IBEW Local 204*, 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987) (well defined public policy of operating nuclear plants safely); *Stead Motors of Walnut Creek v. Machinists Lodge 1173*, 843 F.2d 357, 127 LRRM 3213 (9th Cir. 1988) (well defined public policy of automotive repair shop placing safe vehicles on highways breached by an award reinstating mechanic who negligently failed to tighten wheel lugs); and *Newsday, Inc. v. CWA Local 915*, 915 F.2d 840, 135 LRRM 2659 (2d Cir. 1990) (well defined public policy of workplace freedom from sexual harassment breached by award reinstating harasser).

In conclusion, Arbitrator Rohlik endorsed the Last Chance Agreement and then impermissibly injected his view of what was fair and just. It is respectfully submitted that Plaintiff's Motion for Summary Judgment be granted because the decision

of Arbitrator Rohlik did not draw its essence from the Last Chance Agreement and/or is violative of a well defined public policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment on Counterclaim and in Support of its Cross Motion for Summary Judgment has been served by first class, prepaid postage upon the below-listed party this 12th day of March, 1991:

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